

US EPA ARCHIVE DOCUMENT

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Title VI Guidance Comments  
U.S. Environmental Protection Agency  
Office of Civil Rights (1201A)  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

To Whom It May Concern:

The New York City Environmental Justice Alliance (NYCEJA) submits these comments on the "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits."

NYCEJA is an umbrella organization comprised of 14 grass-roots member groups based in low-income communities of color throughout New York City. NYCEJA's constituent communities are among the poorest, the sickest and the most heavily polluted in New York City. The residents are primarily African-American and Latino. Their neighborhoods are saturated with pollution from industrial plants, sludge treatment and waste processing facilities, toxic release sites, and truck traffic.

In 1996, NYCEJA members identified the siting of private waste transfer stations in their communities as the number one environmental problem. Reaching out to other waterfront manufacturing communities that are also overburdened with transfer stations, the members formed the Organization of Waterfront Neighborhoods (OWN) to fight the inequitable concentration of waste facilities. Since then, several NYCEJA and OWN members, together with Congressman Jose Serrano and Congresswoman Nydia Velazquez, have filed Title VI complaints regarding the permitting practices of both the New York City Department of Sanitation (DOS) and the New York State Department of Environmental Conservation (DEC), two recipient agencies.

Consequently, your Title VI permitting guidance is of great concern to NYCEJA and OWN members. Our comments on the revised draft, which follow, are informed by the continuing environmental injustices that are perpetrated by DOS and DEC in their solid waste permitting programs.

Very truly,

Leslie H. Lowe,  
Executive Director

## Comments on the Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits

### II.A.3. Investigation (p. 4):

In determining whether a recipient is in violation of Title VI of EPA's implementing regulations, the Agency expects to assess whether the adverse disparate impact results from factors within the recipients' authority to consider as defined by applicable laws and regulations. [Emphasis added.]

Limiting the analysis to "factors within the recipient's authority" is very problematic for it may allow the underlying causes of the disparate impacts to evade review. Recipient agencies are part of larger governmental-political units which may either tolerate historic patterns of discrimination or may actively engage in discriminatory practices that set the stage for siting polluting facilities in certain communities and not others. A "facially neutral," discretionary action by the larger governmental unit may predetermine siting outcomes that are racially disparate. Seemingly "neutral" factors, like zoning, often mask historic and intentional discrimination; although "spot zoning" has been proscribed by the courts, it is still practiced in numerous subtle ways.

For example, in New York City, waste facilities are to be sited in manufacturing (M2 and M3) zones, most of which are located along the waterfront. However, in 1998, the New York State Legislature enacted a Hudson River Park bill that excludes new uses from the manufacturing zones along the lower Manhattan waterfront that are not "park compatible." This effectively, exempts wealthy, white areas of Manhattan – which generates 60% of the City's commercial waste – from receiving any new garbage facilities. These facilities must now be concentrated in the M2 and M3 zones in low-income communities of color like the South Bronx, Greenpoint-Williamsburg and Red Hook, Brooklyn.

The impact of the Hudson River Park bill was entirely predictable, given that the Legislature had just passed a law mandating closure of the City's only remaining landfill. Moreover, the City was, at the time, actively soliciting bids for construction of new private transfer stations to help export municipal waste. The Legislature did not conduct an Environmental Impact Study or any Title VI analysis to determine what the effect of this legislation would be. Given the context in which it was adopted, this law exempting lower Manhattan from new garbage facilities, has the hallmarks of racially motivated action. Clearly it leads to disparate adverse outcomes: protecting affluent white communities from shouldering any of the City's waste management burdens while concentrating those burdens in communities of color. Facts such as these must be considered in assessing the "justification" for the recipient's action and whether there are "alternatives" available.

VI.A. Framework for Adverse Disparate Impact Analysis (p. 27-28)

- If the complaint alleges discriminatory effects from emissions, including cumulative emissions, determine whether the permit action that triggered the complaint significantly decreases overall emissions at the facility. If so, then OCR will likely close the investigation of allegations regarding cumulative impacts. [Emphasis added.]

This provision is stunningly myopic. If cumulative impact is alleged, the issue is not whether the facility is producing less pollution than others in or near the affected community. The issue is whether the added pollution from the facility – whatever it may be – contributes adversely to the disparity between an already overburdened area and the comparison area. The proposed language reveals an indefensible shift in focus away from protection of people and their environment to what is feasible (read profitable) for industry. In communities already saturated with pollution, where rates for environmentally-related illnesses like asthma exceed national and local averages, any incremental increase may be too much.

EPA's approach flies in the face of the basic public health concept of "prudent avoidance" of additional harm to vulnerable populations. Incremental increases in pollution must be assessed with reference to the existing pollution load and the impact on human health. The proposed language also betrays EPA's very serious failure to develop an analytic framework for cumulative, multi-media impact assessment. In the absence of such a framework we are left with the "drop in the bucket" approach. No matter how many additional "drops" of pollution are added to the poison stew, the bucket never overflows.

Step 2: Define Scope of Investigation (p. 28)

Determine the nature of the stressors, sources of stressors and/or impacts cognizable under the recipient's authority [...]

As in our comment for II.A.3., above, limiting Title VI analysis to impacts exclusively under the recipients authority is taking a "one-eyed look" at the problem; one guaranteed not to reveal its true nature or extent. Even if the recipient lacks authority to control or mitigate an impact, that impact may be highly relevant to the disparity analysis and should not be ignored. Prior and foreseeable future actions which result in disparate adverse impacts when examined together with the permit under review, must be taken into account by the recipient and by EPA. Often, permits are issued or renewed in areas where other agencies have jurisdiction over projects planned or undertaken by government or the private sector. Should the recipient turn a blind eye to adverse impacts these projects will create when deciding whether to permit a facility? This would constitute impermissible segmentation of the environmental review and it should be equally unacceptable in Title VI analysis.

VI.B.2.a. Determine the Nature of Stressors and Impacts Considered

In determining the nature of stressors (e.g., chemicals, noise, odor) and impacts to be considered, OCR would expect to determine which stressors and impacts are within the recipient's authority to consider (p.31) [Emphasis added]

Once again, this is an unjustifiable limitation on the scope of the Title VI analysis. Although the text describes a situation where the recipient has authority but has not exercised it, no example is given where a relevant impact or stressor is identified that is not within the recipient's authority. However, as noted above, the issue is not whether the recipient has authority to alleviate a particular impact or eliminate a stressor. It is whether the existence and/or severity of the impact should have figured in the recipient's determination to issue the permit. Existing disparate impacts over which the recipient may have no authority (*e.g.*, pollution from diesel bus garages in the community) must be part of the Title VI analysis.

NYCEJA believes that the more sound approach is simply to identify the Title VI community, the relevant Universe of Sources (VI.B.2.b., p. 32-33), the adverse impacts emanating therefrom, and pathways to sensitive receptors. If the challenged permit would create or exacerbate disparity in the level of adverse impacts borne by the affected community *viz* the comparison community, then a *prima facie* claim under Title VI has been stated and the burden of persuasion should shift to the recipient.

#### VI.B.4.b. Use of National Ambient Air Quality Standards (p.38)

NYCEJA strongly objects to reliance on the NAAQS to set "adverse impact benchmarks." The essence of a Title VI complaint is that an insular community is forced to bear disproportionate *localized impacts* that the population of the larger community does not bear. Consequently, the use of a regional air quality standard to assess local impacts is completely inappropriate. Where localized impacts are alleged, empirical evidence (not computer simulations using spurious data) must be gathered whenever possible. The inadequacies of the NAAQS and EPA's air program, generally, are painfully obvious to all of us who have lived in this "non-attainment" area for the past 30 years.

Despite the fact that asthma rates in communities of color throughout the City are multiple times the national average, the State's network of air monitors historically bypassed these neighborhoods. NYCEJA and other environmental justice advocates have long fought for placement of air monitors in communities with high asthma levels and in heavy industrial neighborhoods, like the South Bronx and Red Hook. Although some new PM<sub>2.5</sub> monitors have been located in heavily impacted areas, it will take three years to establish a baseline for them. Regional air models based on data from suburban and rural communities have no logical nexus to or predictive value regarding discrete local conditions in dense urban areas.

New York City, for example, is comprised of 5 counties of the State. The New York Metro air quality region includes 9 counties in the "down-state" region (New York City and 4 suburban counties, plus several cities in yet a tenth county). In assessing whether traffic and air impacts generated by a facility are significant, current methodology looks to the vehicular miles traveled within this very large region. But to assess local traffic impacts against the volume generated in such a large region is nonsensical. Yet, this is precisely what occurs

In 1998, the City began sending municipal garbage to two private transfer stations in Greenpoint-Williamsburg, Brooklyn. These facilities are located within less than two miles of each other, in a community that has 18 other garbage transfer stations within the same small area. These waste facilities generate over 10,000 heavy diesel truck trips per week. Although the City garbage added over 2300 trips per week, both DOS and DEC determined that the diversion of municipal waste to this already overburdened community would have no significant environmental impact. This determination rested on the claim that, in terms of total regional VMT, the additional truck traffic through Greenpoint-Williamsburg was insignificant. It was, however, highly significant to local residents who could no longer cross the street safely.

VI.B.5.b. Comparison to Assess Disparity (p.40-41)

In assessing the level of risk experienced by the affected community and the comparison community, EPA should look to known genetic susceptibility of the affected racial/ethnic population to environmentally related illness linked to various stressors.

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